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CHARLES ELMORE

No. 760

IN THE

Supreme Court of the United States

October Term, 1949

STATE OF IOWA, CONSERVATION COMMISSION OF IOWA, HIGHWAY COMMISSION OF IOWA, GEORGE CORRIELL, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*
FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Intervenor*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE INTERVENOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 11-25) is reported at 178 F. 2d 421. The order of the Federal Power Commission here involved (R. 106-111, cf. 91-94) is not yet officially reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on December 28, 1949 (R. 25). A petition for rehearing was denied January 20, 1950 (R. 43). The petition for certiorari was filed on April 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Federal Power Act to license the power project proposed by First Iowa Hydro-Electric Cooperative on and along the Cedar and Mississippi Rivers in Muscatine and Cedar Counties, Iowa.

2. Whether there is substantial evidence in the record to support the Commission's finding that the project in question is economically sound, practicable, and feasible.

3. Whether the Commission erred in failing to require First Iowa Hydro-Electric Cooperative to comply with certain Iowa statutes in conflict with the Federal Power Act.

4. Whether the Commission failed to give effect to the Wildlife Resources Act of August 14, 1946.

STATEMENT

In 1929 the Chief of Engineers (U. S. Army) submitted to Congress a report covering navigation, flood control, power development and irrigation on the Iowa River and its tributaries.[1] In this report the Chief of Engineers recognized that the diversion of substantially all of the waters of the Cedar River near Moscow, Iowa to the

[1] H. R. Doc. No. 134, 71st Cong. 2d Sess. 86, 87, 90.

Mississippi River near Muscatine, Iowa was an engineering possibility and constituted the largest power development foreseeable on either the Cedar or Iowa Rivers. First Iowa Hydro-Electric Cooperative (hereinafter referred to as First Iowa) was organized in 1938 under the laws of Iowa,[2] as a non-profit cooperative association, with a view to developing such a project on the Cedar River near Moscow and Muscatine, Iowa. First Iowa obtained options to 98% of the riparian rights on the Cedar River in that area. 328 U. S. 152, 158.

On January 29, 1940 First Iowa, pursuant to section 23(b) of the Federal Power Act, 16 U. S. C. sec. 817, filed a declaration of intention with the Federal Power Commission for a hydro-electric development utilizing the waters of the Cedar River in Cedar and Muscatine Counties, Iowa (Tr. 3099). In accordance with its usual practice, the Commission notified the Governor of Iowa by letter dated February 7, 1940 of the filing of this declaration of intention by First Iowa (Tr. 3097). On April 2, 1941 the original declaration of intention was supplemented to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa (Tr. 3105). On June 3, 1941 the Commission made the following findings (R. 238):

> (1) The Cedar and Iowa Rivers are navigable waters of the United States;
>
> (2) The diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;
>
> (3) The alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctua-

[2] Ch. 390-G-1 and section 8341 of the Iowa Code of 1935.

tions in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) The interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) The two small islands . . . [in the Cedar River] are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) A license for the construction proposed above is required under the provisions of the Federal Power Act.

A copy of these findings was transmitted to the State Commerce Commission, Des Moines, Iowa. From these findings the State of Iowa filed no petition for rehearing or for court review. The sixty days thus allowed for review having expired, First Iowa on August 11, 1941, pursuant to section 4(e) of the Federal Power Act, filed an application with the Federal Power Commission for a license to construct, operate and maintain the proposed power development project on the Cedar and Mississippi Rivers (R. 1-6). It was at this stage of the proceedings that the State of Iowa, on October 16, 1941, petitioned to intervene for the first time (R. 6-13). The petition was allowed on November 4, 1941 (R. 6). Other state agencies intervened at approximately the same time (R. 28-39).

After extended hearings the Commission on January 29, 1944 found that the applicant's "present plans call for a practical and reasonably adequate development to utilize the head water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable" (Tr. 3387). The Commission, nevertheless, dismissed the application for license upon the finding that the "applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the require-

ments of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice" (R. 45). In further explanation of its dismissal, the Commission stated that the "appropriate place for a determination of the validity of such State laws [of Iowa requiring a license from the State Executive Council] is in the court and, if we dismiss the application for license on the basis of failure to comply with the requirements of Section 9(b), applicant may seek review of our action and its contentions under Section 313(b) of the Federal Power Act" (Tr. 3389-3390).

A petition for rehearing having been denied (Tr. 3401), First Iowa petitioned the United States Court of Appeals for the District of Columbia for review. The State of Iowa intervened. That court affirmed the order and opinion of the Commission. *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n.*, 80 App. D. C. 211, 151 F. 2d 20 (1945).

Thereupon First Iowa applied for and over the State's objections obtained a writ of certiorari. The State thereafter filed a brief on the merits and participated in the oral argument, contending *inter alia* that the Cedar and Iowa rivers were non-navigable (No. 603, Oct. Term 1945, Br. 39-41). This Court reversed (*First Iowa Hydro-Electric Coop.* v. *Federal P. Com.*, 328 U. S. 152), holding (p. 181) that "the detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls" and (p. 182) that "it is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon [power developments on navigable waters of the United States] on behalf of the people of Iowa as well as on behalf of all others." In the course of its opinion, this Court pointed out (p. 159, fn. 4) that

the Commission on February 7, 1940 "had sent notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto. The State, however, took no part in the proceedings." This Court further observed that "the findings made by the Commission on June 3, 1941, in response to the petitioner's declaration of intention are not in question. *For the purposes of this application*[3] [for a license from the Federal Power Commission] it is *settled* that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been *determined* to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission. *The project is clearly within the jurisdiction of the Commission under the Federal Power Act*" (p. 163). The judgment of the Court of Appeals for the District of Columbia was accordingly reversed with directions to remand the case to the Commission for further proceedings in conformity with this Court's opinion.

The State of Iowa filed a 31 page petition for rehearing in which it contended that "Cedar River is not a navigable water of the United States," and hence not subject to the jurisdiction of the Federal Power Commission, citing *inter alia* the Acts of Congress of May 6, 1870 and August 18, 1894 (No. 603, Oct. Term 1945, Pet. for Rehearing, pp. 2-11, 26-28, 30-31). Rehearing was denied (328 U. S. 879).

Being of the opinion that the record should be supplemented by a further showing as to the design and economic feasibility of the project under 1946 conditions, the Commission by order dated August 6, 1946 (R. 52), re-

[3] Italics supplied throughout this brief.

opened the record in conformity with this Court's opinion and set the matter down for public hearing upon those points. In view of its own findings in the June 3, 1941 order and the explicit language of this Court's opinion, it denied the petition of the State of Iowa seeking to reopen the issues of jurisdiction and navigability (R. 46, 70). Further hearings were held by the Federal Power Commission in September and October 1946 before a Trial Examiner. It was at this point in the proceedings that George Corriell and certain other landowners directly affected by the project became parties intervenor (R. 39-43). In due course, after oral argument, the Commission on December 19, 1947 issued a preliminary opinion stating that it would issue a license for the construction of the proposed project if certain specified conditions were complied with by First Iowa (R. 243-248). On September 8, 1948 the Commission found that these conditions had been met and issued a license to the applicant to construct and operate the proposed project (R. 106-111).

After denial by the Commission of a petition for rehearing (R. 111-150), the State of Iowa and those associated with it petitioned the Eighth Circuit for review. First Iowa was allowed to intervene (R. 10). On December 28, 1949 the Eighth Circuit unanimously denied the State's petition to set aside the orders of the Federal Power Commission (R. 25-26). A petition for rehearing was similarly denied January 20, 1950 (R. 43).

ARGUMENT

I

Petitioners' present attacks (Pet. 4-5, 6-10, 15-24) on the jurisdiction of the Federal Power Commission to license the Moscow dam project on the Cedar and Mississippi Rivers in Muscatine and Cedar Counties, Iowa, have been previously considered and rejected by this Court in its earlier review of the proceedings in this case. That determination, if not *res judicata*, has certainly become the law of the case.

Notice of the filing by First Iowa of its declaration of intention to utilize the waters of the Cedar River for a hydro-electric power project was sent to the Governor of Iowa in accordance with the Commission's usual practice in section 23(b) proceedings (Tr. 3097). The State did not intervene. On June 3, 1941 the Commission found that the proposed project would affect navigable waters of the United States and that a federal license was therefore required under the Federal Power Act (2 F. P. C. 958). A copy of these findings was likewise served on State officials of Iowa. No petition for rehearing or for court review was filed by the State of Iowa within the statutory period prescribed by the Federal Power Act. Sections 313(a) and (b); 16 U. S. C. secs. 825 l(a) and (b). The jurisdictional findings of the Commission are thus *res judicata*.

By subsequently intervening in the license application proceeding instituted by First Iowa on August 11, 1941, the State of Iowa became a party to the proceeding as it then stood and could not relitigate issues already resolved. *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, 498.

In any event, by reason of the previous appeals in this proceeding, the Commission's jurisdictional findings have become the law of the case. On January 29, 1944 the Com-

mission dismissedl, without prejudice, First Iowa's application for a licensee. From that dismissal order First Iowa took an appeal to the United States Court of Appeals for the District of Collumbia, which affirmed the action taken by the Federal Power Commission. From there the case came to this Court on certiorari. The State of Iowa actively participatted in the review proceedings in both courts as a party intervenor. It was free to defend the dismissal order on any grounds it saw fit, including jurisdictional grounds, and such arguments were advanced by the State in its brief on the merits (No. 603, Oct. Term 1945, Br. 39-41) and in a subsequent petition for rehearing (No. 603, Oct. Term 1945, Pet. for Reh. pp. 2-11, 26-28, 30-31).

This Court nevertheless reversed the Commission's order of dismissal and remanded the case to the Federal Power Commission for further proceedings. After quoting in full the Commission's jurisdictional findings of June 3, 1941, this Court made pointed reference to the fact that the Commission had sent notice to the Governor of Iowa of the filing of the declaration of intention and that "the State, however, took no part in the proceedings" (328 U. S. 159). Regarding the jurisdictional findings of June 3, 1941, the Court thereafter made this comment at page 163:

> "For the purposes of this *application* it is settled that the project will affect the navigability of the **Cedar, Iowa and Mississippi Rivers, each of which has** been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission. *The project is clearly within the jurisdiction of the Commission under the Federal Power Act.*"

From the context and from other passages in the opinion, it is obvious that this Court was referring to First Iowa's

"application" for a license and not its "petition" for certiorari. In short, for purposes of its application to construct a hydro-electric power project on the Cedar and Mississippi Rivers, it was "settled" and "determined" that the rivers in question are "part of the navigable waters of the United States" and that "the project is clearly within the jurisdiction of the Commission under the Federal Power Act". In a subsequent 31 page petition for rehearing the State argued at length that the judgment of the court below dismissing First Iowa's application for a license should be affirmed on the ground that the Cedar River was not a navigable water of the United States, citing the Act of Congress of August 18, 1894, and numerous other authorities upon which the State again relies in its instant petition (Pet. 6, 16). The Commission's jurisdictional findings have thus become the law of the case and should not be reopened on a subsequent petition to this Court. *Washington Bridge Co.* v. *Stewart,* 3 How. 413, 425; cf. *Sunshine Anthracite Coal Co.* v. *Atkins,* 310 U. S. 381, 403.

It is well settled that after a case has been taken to this Court and there decided and a mandate issued to the court below, that if the case is taken up for review a second time, it brings up for review nothing but the proceedings subsequent to the mandate. *In re Potts,* 166 U. S. 263, 267; *National Labor Rel. Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 227-228.

In view of this Court's categorical language in its earlier opinion in this proceeding and its pointed reference to the jurisdictional findings of June 3, 1941, the Commission rightly determined on remand to refuse to hear further evidence on jurisdictional questions and to confine the further hearings to bringing the record up to date on the questions of design and economic feasibility. The Commission was not required to reopen any issue as to which its ruling was left unassailed by this Court's previous

decision. *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 146; *United States* v. *Morgan*, 307 U. S. 183, 186-187.

While the rule of the law of the case is a rule of practice, it is nevertheless based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. Cf. *United States* v. *U. S. Smelting, Refining & Mining Co.*, (No. 173, Oct. Term 1949, decided March 28, 1950). Administrative and judicial proceedings in connection with First Iowa's application for a license for its power project in Iowa have already dragged out for ten years. Under the terms of the license granted September 8, 1948, construction must be begun within two years. Financing cannot be concluded with litigation pending. A grant of certiorari to review jurisdictional questions already resolved by this Court would carry this case over to the October Term 1950, beyond the two-year period allowed for commencement of construction. The doctrine of the law of the case is clearly a salutary one under these circumstances.

Furthermore, this Court will certainly take judicial notice of the fact that the Mississippi River is a navigable interstate stream. *Arizona* v. *California*, 283 U. S. 423, 452. It is a fact too clear to admit of argument that the diversion of the waters of the Cedar River into the Mississippi River near Muscatine, Iowa, rather than at the confluence of the Iowa and Mississippi Rivers some 20 miles to the south, will affect the flow of the Mississippi River for at least a distance of 20 miles and thus affect interstate commerce. This fact alone confers jurisdiction on the Federal Power Commission. *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C. C. A. 5, 1946); cf. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 399, 401, 402, 419-428.

II

There is a short answer to petitioners' next contention (Pet. 12-13, 24-25) that the project is not economically feasible. Section 313(b) of the Federal Power Act expressly provides that the findings of the Commission as to the facts, if supported by "substantial evidence", shall be conclusive on the courts. 49 Stat. 860, 16 U. S. C. sec. 825 l(b). Under such a statute the courts will not reweigh the evidence and substitute their judgment for that of the administrative agency. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596-597.

The Commission considered voluminous testimony on the question of economic feasibility, only a portion of which was included by petitioners in the printed record in the court below. Some of the additional evidence in support of the Commission's finding that the project is economically feasible was included in a supplemental record printed by the Federal Power Commission (R. 249-257). Additional testimony (not printed) was supplied by applicant's own witnesses, e. g. Nash (Tr. 3174, 4909) and Holway (Tr. 3042, 3096, 3168, 4741). Since the record contains substantial evidence in support of the Commission's findings (e. g. R. 249-257), the findings on economic feasibility, being findings of fact, are thus conclusive under Section 313(b) of the Federal Power Act. *Montana Power Co.* v. *Federal Power Commission*, 112 F. 2d 371-374 (C. C. A. 9, 1940). Certiorari does not ordinarily lie to review evidence or the inferences to be drawn therefrom. *General Talk. Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175, 178; *National Labor Rel. Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 208-209.

III

Petitioners' further contention (Pet. 13-14, 25-26) that the Commission, on remand, ignored section 9(b) of the Federal Power Act and the mandate of this Court is with-

out merit. This Court, in its prior decision in this proceeding, held that section 9(b) of the Federal Power Act does not require the Commission to compel an applicant to comply with conflicting requirements of state law. 328 U. S. 152, 162, 170. This Court further held (p. 181) that the "detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls", a result previously reached in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404-405, 426-427. "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others" (p. 182). This Court elsewhere observed that "if it had been the wish of Congress to make the applicant obtain consent of state, as well as federal authorities, to each project, the simple thing would have been to so provide", but that section 9(b) had not so provided (p. 178).

It is thus clear that the Commission was not required under section 9(b) of the Act to give further consideration to the conflicting provisions of Iowa State law relied upon by petitioners. The subsequent proceedings before the Commission were in complete conformity with this Court's opinion and the resulting mandate.

IV

Petitioners' final contention (Pet. 14-15), not briefed, that the Commission ignored and refused to give effect to the Wildlife Resources Act of August 14, 1946 is devoid of merit. In view of the limited issues left to be determined on remand, it is doubtful whether the Act of August 14, 1946 adopted in the interval between the first and second hearing should be given retroactive application in a proceeding theretofore begun and substantially concluded. *United States Fidelity Company* v. *Struthers Wells Co.*, 209 U. S. 306, 314. In any event the Commis-

sion's order of September 8, 1948 granting the license in question carefully provides for the protection of fish and wildlife resources. Paragraph 12(c) states that "the licensee shall construct, maintain, and operate such fish protective devices and shall comply with such reasonable conditions in the interests of fish life *as may be hereafter prescribed* upon the recommendation of the Secretary of the Interior" (R. 106, 108). Since the Act of August 14, 1946 merely requires "consultation" with State agencies (60 Stat. 1080), the Commission has given due effect to the Wildlife Resources Act of August 14, 1946.

CONCLUSION

The questions presented were correctly decided by the court below. There is no conflict of decisions. The jurisdictional objections which petitioners seek to raise have already been rejected by this Court in its previous consideration of this case. The other issues present no questions of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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